BRB No. 99-0950 BLA

DONNA MOVINSKY (Daughter of ANTHONY MOVINSKY) Claimant-Respondent v. HELVETIA COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan Administrative Law Judge, United States Department of Labor.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-BLA-0789) of Administrative Law Judge Richard A. Morgan on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The administrative law judge found that the record

[1] Claimant, Donna Movinsky, is the disabled daughter of the miner, Anthony Movinsky. Barbara Cook, claimant's sister, is pursuing this appeal on behalf of claimant.

established a coal mine employment history of "at least" fourteen and one-half years and that the existence of coal workers' pneumoconiosis was established at Section 718.202(a)(2) and was corroborated by medical opinions and the majority of x-ray readings, and that the parties agreed with both determinations. Decision and Order at 3, 20. The administrative law judge also found that claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment, Decision and Order at 21, and that claimant established that pneumoconiosis was a substantially contributing factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Decision and Order at 22-27. Accordingly, survivor's benefits were awarded.

On appeal, employer contends that the administrative law judge erred in relying upon the opinions of Drs. Rizkalla, Perper and Schaff as support for a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2). Employer further contends that the administrative law judge erred in failing to discuss and weigh relevant evidence of record, and that the administrative law judge improperly rejected the medical opinions of Drs. Sinnenberg, Osterling and Bush. Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this case.[2]

The Board's scope of review is defined by statute. If the administrative law judge's

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The miner died on December 12, 1995. The death certificate lists the immediate cause of death as acute myocardial infarction due to heart disease due to hypertension. Director's Exhibit 13. The miner had filed a claim which was denied on September 15, 1995, in a Decision and Order issued by Administrative Law Judge Michael Lesniak. This finally denied claim is not presently before the Board.

[2] We affirm as unchallenged on appeal, the administrative law judge's findings of fourteen and one-half years of coal mine employment, that the miner suffered from pneumoconiosis, and that claimant was entitled to the presumption at Section 718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any element precludes entitlement. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Employer contends that the administrative law judge erred in relying on the opinion of the autopsy prosector, Dr. Rizkalla, that coal workers' pneumoconiosis was a substantially contributing factor leading to the miner's death, Director's Exhibits 14, 27, based solely on the physician's status as prosector. Employer asserts that the administrative law judge's decision to accord greater weight to the prosector's first-hand observations ignores testimony from Dr. Sinnenberg, who reviewed the autopsy slides and found that such slides were representative of the lungs as a whole and that they provided a sufficient basis for determining whether the miner had coal workers' pneumoconiosis and whether it played a role in the miner's death. Director's Exhibit 27.

As found by the administrative law judge, Dr. Rizkalla conducted the autopsy and found that coal workers' pneumoconiosis was a substantially contributing factor leading to the miner's death, based upon both a gross and microscopic examination. Director's Exhibit 14. Contrary to employer's assertion, the administrative law judge accorded greatest weight to the opinion of Dr. Rizkalla based upon more than a mechanical recognition of the physician's status as prosector. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *see also U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3d Cir. 1982); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Rather, in addition to relying on Dr. Rizkalla's status as the prosector, the administrative law judge also found that Dr. Rizkalla's Board-certification in pathology as well as his well reasoned and thorough autopsy report, which was supported by his deposition testimony, provided a basis for crediting his opinion over the others of record. Additionally, the administrative law judge noted that although Drs. Sinnenberg and Osterling, who reviewed the autopsy slides, did not agree with Dr. Rizkalla's opinion that coal workers' pneumoconiosis contributed to the miner's death, although they both admitted that coal workers' pneumoconiosis could have contributed to the miner's lung

disease. Decision and Order at 25. Further, in considering the opinions of the pathologists, the administrative law judge accorded greater weight to the opinion of Dr. Rizkalla because while Dr. Sinnenberg "has not conducted an autopsy on a coal miner since 1986 and is not published in the field of occupational medicine," "Dr. Rizkalla clearly performs many more autopsies on coal miners currently...." Decision and Order at 25. Accordingly, the administrative law judge's determination that Dr. Rizkalla's opinion was entitled to greater weight is rational. *See Urgolites*, *supra*.

We also reject employer's assertion and hold that there is nothing inherently inconsistent in the administrative law judge's conclusion that while the miner did not have cor pulmonale as diagnosed by Dr. Rizkalla, his opinion that pneumoconiosis was a substantially contributing factor leading to miner's death was nonetheless sufficient to support claimant's burden at Section 718.205(c)(2). The administrative law judge's conclusion that claimant did not suffer from cor pulmonale with right sided congestive heart failure, *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991), was a medical determination based upon a review of the entirety of the record. The administrative law judge reasonably credited Dr. Rizkalla's findings regarding the cause of the miner's death as the physician sufficiently explained his conclusions on the matter. *See Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59 (1997), *aff'd Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999).

Employer further asserts that the administrative law judge improperly relied on the opinion of Dr. Perper to find that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) as the opinion of Dr. Perper was not supported by the record. Specifically, employer asserts that Dr. Perper's conclusion that the miner suffered from complicated coal workers' pneumoconiosis calls into question the credibility of his entire opinion as the physician "overestimated the degree of coal workers' pneumoconiosis," that the miner suffered from, Employer's Brief at 5, and opined that the miner's pulmonary hypoxemia triggered cardiac arrhythmia leading to death, based on the severity of the "interstitial disease process." Dr. Perper reviewed the slides from Dr. Rizkalla's autopsy and concluded that coal workers' pneumoconiosis was a substantially contributing factor leading to the miner's death directly or indirectly, inasmuch as the pulmonary hypoxemia resulting from coal workers' pneumoconiosis either triggered or aggravated the cardiac arrhythmia which was the ultimate cause of the miner's demise. Director's Exhibit 26; Claimant's Exhibit 1. The administrative law judge concluded that, while Dr. Perper's opinion diagnosing the existence of complicated pneumoconiosis was insufficient to support such a determination absent other evidence, *see* Decision and Order at 24-25, the physician's conclusion that coal workers' pneumoconiosis was a substantially contributing factor leading to the miner's death, was reasonable. Contrary to employer's assertion, the administrative law judge permissibly concluded that Dr. Perper's medical conclusions supported claimant's

burden at Section 718.205(c)(2) inasmuch as Dr. Perper was "Board-certified in anatomic and forensic pathology," was "well published," had "taught pathology," and based his "comprehensive 21-page report" on "his review of enumerated records beginning in 1979" and his medical judgement, that the miner's coal workers' pneumoconiosis triggered hypoxemia which in turned triggered cardiac arrhythmia, demonstrated that the miner's death was substantially contributed to by the existence of coal workers' pneumoconiosis. *See Mays*, *supra*;[3] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Employer next asserts that the administrative law judge erred in failing to discuss and weigh relevant and highly probative medical evidence compiled during the miner's lifetime and after his death: in particular, that the administrative erred in failing to address the significance of the pulmonary function study and blood gas study evidence of record, because "the severity of coal workers' pneumoconiosis is often highly correlated with the result of objective lung function testing," Employer's Brief at 14; that the administrative law judge failed to consider whether the findings of medical opinion evidence compiled during claimant's lifetime would correlate with pathologic evidence; and that the administrative law judge failed to give due consideration to the post-mortem evidence, especially the opinion of Dr. Tuteur who concluded that while the miner did suffer from coal workers' pneumoconiosis, the disease did not significantly contribute to, cause or hasten the miner's death. Employer's Exhibit 6.

Inasmuch as the only issue before the administrative law judge is whether the miner's pneumoconiosis was a substantially contributing factor leading to the miner's death, pursuant to Section 718.205(c)(2); *see Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985); we conclude that evidence which fails to address

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[3] We reject employer's assertion that the administrative law judge erred in crediting Dr. Schaff's opinion as corroborative of Dr. Perper's finding that the miner's death was due to pneumoconiosis. A review of the Decision and Order demonstrates that, while the administrative law judge did note Dr. Schaff's statement that a pre-existing pulmonary condition restricted a miner's ability to recover from any other illness, the opinion was not relied upon by the administrative law judge as support for his ultimate finding, *i.e.*, that in the instant case pneumoconiosis was a substantial contributing factor to the miner's death.

specifically whether the miner's pneumoconiosis was a contributing factor to his death does not constitute relevant probative evidence pursuant to Section 718.205(c)(2). *See Neeley*, *supra*; *Foreman*, *supra*; *see generally Trent v. Director, OWCP*, 11 BLR 1-26 (1987)(objective studies relevant to the issue of total disability). We therefore hold that any error made by the administrative law judge in discussing evidence which does not address the role of pneumoconiosis in the miner's death is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Moreover, we reject employer's assertion that the administrative law judge, impermissibly engaged in a selective analysis of Dr. Tuteur's opinion and did not discuss the overall weight given to the opinion. In considering the medical opinion evidence pertaining to the miner's death, the administrative law judge specifically indicated that he was giving greatest weight to the opinions of Drs. Perper, Osterling, Sinnenberg and Rizkalla as they were "the most qualified of those presenting evidence in this case." Decision and Order at 25. Furthermore, contrary to employer's argument the administrative law judge did discuss Dr. Tuteur's opinion. Decision and Order at 23. A review of Dr. Tuteur's opinion demonstrates that his conclusions were not based on an autopsy or a review of autopsy slides, but were instead based on reviews of other medical evidence. Likewise, inasmuch as autopsy evidence is the most credible evidence regarding the presence and extent of pneumoconiosis, *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), we conclude that the administrative law judge's failure to accord dispositive weight to the opinion of Dr. Tuteur does not constitute reversible error.

Similarly, contrary to employer's assertion, the administrative law judge did not err in according little weight to Dr. Bush's opinion that the miner's death was due to heart failure and that the miner's coal workers' pneumoconiosis did not contribute to his death, because, among other reasons, Dr. Bush was a pulmonary specialist and by his own admission would defer to the expertise of pathologists in interpreting pathologic evidence.[4] *See generally*

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[4] The administrative law judge noted that Dr. Bush's opinion was entitled to little weight because he believed coal workers' pneumoconiosis is not disabling, does not progress upon the cessation of exposure to coal dust, and as an "A reader" could not explain what the measure of a "q" size opacity was. We reject employer's argument that these factors could not be considered by the administrative law judge in an overall assessment of the credibility

Terlip, *supra*.

Finally, contrary to employer's assertion, we conclude that the administrative law judge permissibly accorded less weight to the opinions of Drs. Osterling and Sinnenberg, both of whom reviewed the autopsy slides and concluded that coal workers' pneumoconiosis played no role in the miner's death. Director's Exhibits 15, 27; 30; Employer's Exhibits 1, 2. As discussed, *supra*, the administrative law judge, in a permissible exercise of his discretion, accorded greater weight to the contrary opinion of Dr. Rizkalla. We conclude, therefore, that employer's assertion that the administrative law judge did not properly weigh the pathologists' opinions is tantamount to a request that the Board reweigh the evidence of record, a role outside of our scope of review, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judges determination that claimant has established that pneumoconiosis was a substantially contributing factor leading to the miner's death. *See* 20 C.F.R. §718.205(c)(2); *Lukosevicz*, *supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

of Dr. Bush's opinion. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

REGINA C. McGRANERY
Administrative Appeals Judge